IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	
v.	CRIMINAL NO. 15-602-1
DAVID M. DUNHAM, JR.	

MEMORANDUM OPINION

Schmehl, J. **April 20, 2018**

Before the Court is Defendant's Motion to Dismiss the Indictment due to Outrageous Government Misconduct. In short, Defendant seeks dismissal of the indictment based on his claim that the government intentionally took advantage of an alleged conflict of interest between Defendant and his counsel, who advised him to cooperate with the government. The government has opposed Defendant's motion, and argument was heard.

I. STATEMENT OF FACTS

Pursuant to an indictment that was returned on December 17, 2015, a grand jury charged Defendant and his former business associate, Ralph Tomasso, with conspiracy in violation of 18 U.S.C. § 371, making false statements to government agencies in violation of 18 U.S.C. § 1001, wire fraud in violation of 18 U.S.C. §1343, filing false tax returns in violation of 26 U.S.C. § 7606(1), obstruction of the administration of the Internal Revenue Service in violation of 26 U.S.C. § 7212(a), and obstruction of justice in violation of 18 U.S.C. § 1519. Generally, the indictment alleges that Defendant and Tomasso, who each owned and operated biofuels companies, engaged in a

comprehensive scheme to defraud the United States of tax credits and grant monies. They are also accused of defrauding purchasers of Renewable Identification Numbers ("RINs").

Defendant owned Smarter Fuels, LLC, and Tomasso owned Environmental Energy Recycling Corporation. At some point, Defendant and Tomasso merged their companies into one company called Greenworks Holdings. Defendant and Tomasso sought the assistance of a consultant, Michael McAdams, to provide assistance with the complex regulatory matters at issue in this case.

McAdams, although formerly an attorney, was no longer licensed to practice at the time Defendant consulted with him. He was President of the Advanced Biofuel Association and was associated with the Washington D.C. firm of Brownstein, Hyatt, Farber, and Schreck. Beginning on January 1, 2010, Defendant and 3 other biofuels companies began to pay McAdams for consulting services regarding tax credits and the generation and sale of RINs. In January of 2011, McAdams moved to the law firm of Holland & Knight ("H&K"). Defendant claims that he regularly consulted with McAdams regarding legal matters and regulatory issues addressed in this case, and that McAdams was the individual providing advice to him on these issues.

On July 18, 2012, the government executed search warrants of Defendant's business and home. He contacted McAdams, who was on vacation at the time. McAdams told Defendant that he would have a partner at H&K, John Brownlee, contact him. Thereafter, Defendant retained H&K and John Brownlee to represent him in connection with the government's investigation. Since McAdams and Brownlee were associated with

the same firm, a conflict of interest was clearly possible, as Brownlee may have attempted to shield McAdams and/or H&K from any liability.

Defendant claims that over the next year, at Brownlee's urging, he decided to attempt to negotiate a cooperation plea agreement with the government. In that regard, he met with government officials on July 9, 2013, December 5, 2013, and January 2, 2014, after signing a proffer letter on June 20, 2013. Defendant claims that during his first meeting with the government, the government became aware that McAdams was the one who provided advice to Dunham, but failed to raise the issue of the resulting conflict with Brownlee, a member of the same firm as McAdams, until almost nine months later. In February of 2014, Assistant United States Attorney Nancy Potts sent Defendant an "Acknowledgment and Waiver" of H&K's conflict of interest. Defendant alleges that by allowing him to cooperate and effectively admit to some of the conduct that was under investigation, the government exploited the conflict of interest between H&K and Defendant to its benefit and Defendant's detriment.

II. STANDARD OF REVIEW

"An indictment is an accusation only, and its purpose is to identify the defendant's alleged offense ... and fully inform the accused of the nature of the charges so as to enable him to prepare any defense he might have." *United States v. Stansfield*, 171 F.3d 806, 812 (3d Cir. 1999) (quotations and citations omitted). "In considering a defense motion to dismiss an indictment, the district court [must] accept[ ] as true the factual allegations set forth in the indictment." *United States v. Bergrin*, 650 F.3d 257, 265 (3d Cir. 2011) (quoting *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990)) (alterations in original).

III. DISCUSSION

The defense of outrageous government misconduct "is reserved for only the most egregious circumstances." *United States v. Waddy,* 2003 WL 22429047, at *8 (E.D.Pa. Sept.18, 2003). Dismissal of an indictment is warranted when "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell,* 411 U.S. 423, 431–32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). Government conduct must be fundamentally unfair and " 'shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 432 (quoting *Kinsella v. United States,* 361 U.S. 234, 246, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960)). The burden for proving outrageous government misconduct is substantial. *United States v. Nelson,* 2011 WL 882302, at *4 (M.D. Pa. Mar. 11, 2011).

The Third Circuit has considered and rejected Fifth Amendment challenges to law enforcement conduct in a variety of contexts, such as where the Government allegedly used an undercover agent's sexual relationship with a suspect to obtain inculpatory information, *see United States v. Nolan-Cooper,* 155 F.3d 221, 232 (3d Cir. 1998), and where the Government allegedly interfered with the defendant's attorney-client privilege, *see United States v. Hoffecker,* 530 F.3d 137, 156 (3d Cir. 2008); *Voigt,* 89 F.3d at 1066. Claims of outrageous government misconduct are commonly asserted where an undercover officer allegedly aided or participated in the criminal activity charged against the defendant. *See, e.g., Hampton v. United States,* 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) (plurality opinion); *Russell,* 411 U.S. 423, 93 S.Ct. 1637.

The Third Circuit has granted relief on a claim of outrageous government misconduct only once. In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the Court held that the Government violated the Due Process Clause when an agent was "completely in charge and furnished all of the [relevant] expertise" to create a methamphetamine laboratory. *Id.* at 380–81. In short, the Government "created the crime for the sole purpose of obtaining a conviction." *United States v. Dennis*, 826 F.3d 683, 695 (3d Cir. 2016) (citation omitted). Since *Twigg* was decided, the Third Circuit has repeatedly distinguished, and even questioned, its holding. *See, e.g.*, *United States v. Fattah*, 858 F.3d 801, 812–13 (3d Cir. 2017), as amended (June 12, 2017); *United States v. Beverly*, 723 F.2d 11, 12 (3d Cir. 1983).

In order to raise a claim of outrageousness pertaining to alleged governmental intrusion into the attorney-client relationship, a defendant must demonstrate the following: 1) the Government's objective awareness of an ongoing personal attorney-client relationship between its informant and the defendant; 2) deliberate intrusion into that relationship; and 3) actual and substantial prejudice. *United States v. Kossak*, 178 Fed. Appx. 183, 185 (3d Cir. 2006). Further, "a defendant's moving papers must demonstrate a 'colorable claim' for relief" to advance his argument past the initial pleading stage and be entitled to an evidentiary hearing on the matter. *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996) (citing *United States v. Brink*, 39 F.3d 419, 424 (3d Cir. 1994)). This requires "more than bald-faced allegations of misconduct" and that "issues of material fact" be in dispute. *Id.* (citing *United States v. Sophie*, 900 F.2d 1064, 1071 (7th Cir. 1994)).

There is no case on point with the factual situation I am presented with in this case. However, I will examine the three factors discussed above in *Kossak* and apply them to the facts at hand. First, the defendant must show that the Government was objectively aware of an ongoing conflict between Defendant and Brownlee, his attorney. Here, there is some question as to when the government became aware of the alleged conflict or whether the government understood the nature of a potential conflict. Defendant claims that the government had knowledge of his relationship with McAdams, and therefore his conflict with Brownlee, before Defendant's first proffer on July 9, 2013. (Docket No. 100, p. 1.) The government claims that it did not become aware of a potential conflict until Defendant's third and final proffer on January 2, 2014, when Defendant first claimed that he had been relying on McAdams' advice when he lied about the product that he was generating in order to obtain government subsidies. (Docket No. 95, p. 2.) After the January 2, 2014, proffer, the government informed Defendant of the potential for a conflict of interest with Brownlee and proposed a waiver, which Defendant declined to sign. (*Id*., p. 3.) In response to this argument from the government, Defendant filed a Supplemental Memorandum seeking to provide additional evidence establishing, *inter alia*, that the government had knowledge of Defendant's relationship with McAdams before his first proffer with Brownlee as his counsel. (Docket No. 100.)

A review of all the evidence presented by Defendant in support of his argument that the government was "objectively aware" of the conflict between he and his counsel leads to the conclusion that Defendant cannot produce sufficient evidence to prove that the government knew a conflict existed between he and Brownlee due to Brownlee and McAdams' affiliation with the same firm before Defendant's first proffer in July of 2013.

Defendant has produced much information to prove that he believed McAdams to be his attorney. However, evidence of the government's alleged knowledge of this relationship and the resulting conflict with Brownlee is scant. Further, even assuming arguendo that Defendant had met this first prong of the test, and could prove that the government was objectively aware of the conflict between Defendant and Brownlee, he still cannot meet the high burden of proving outrageous government conduct, as he would clearly fail the second prong of the test.

The second prong requires Defendant to show the existence of a deliberate intrusion into the attorney-client relationship. The *Voigt* court identified a critical factual distinction between cases with egregious government misconduct and those without by analyzing the "active encouragement of impropriety" by the government as opposed to their "passive tolerance" of it. *Voigt*, 89 F.3d at 1066. Here, Defendant cannot prove that the government actively encouraged and exploited the alleged conflict between Defendant and Brownlee. In support of this argument, Defendant claims that "throughout its meeting with Mr. Dunham, the government elicited information from Mr. Dunham which constituted either admissions to perceived wrongdoing or information which the government likely employed for future investigatory purposes." (Docket No. 71, p. 25.) However, Defendant fails to prove how the government actively encouraged and exploited the alleged conflict with Brownlee, as Defendant has presented no evidence that the government, once aware of the conflict, encouraged it for the government's own purposes.

Lastly, Defendant also would fail as to the third prong, which requires actual and substantial prejudice. Defendant makes many allegations of prejudice, claiming that the

information that he provided to the government is specifically memorialized in the indictment. However, it is possible that the government may have obtained this information from other sources. Defendant's mere allegations of similarity between the information he provided to the government and the indictment are insufficient to show that he has suffered actual and substantial prejudice in this matter.

As stated by the Third Circuit, there is no authority imposing an affirmative duty on the government to inform a suspect that he has a potential conflict of interest with his attorney. *Kossak*, 178 Fed. App'x at 186. Accordingly, Defendant's allegations of government misconduct, even if true, fall far short of a "purposeful intrusion into the attorney-client relationship that would rise to the level of outrageousness." *Id.* Accordingly, Defendant's motion is denied.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss the Indictment will be denied.

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ORDER

AND NOW, this 20th day of April, 2018, upon consideration of Defendant Dunham's Motion to Dismiss Indictment Due to Outrageous Government Misconduct (Docket No. 71), and the Government's opposition thereto, as well as all replies and sur-replies, and after argument on said motion, it is hereby **ORDERED** that Defendant Dunham's Motion to Dismiss Indictment is **DENIED**.

BY THE COURT:

/s/
Jeffrey L. Schmehl, J.